

The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

T-MOBILE WEST LLC and  
INDEPENDENT TOWERS HOLDINGS,  
LLC.,

Plaintiffs,

v.

THE CITY OF MEDINA, WASHINGTON,

Defendant.

Civil Action No.: C14-1455RSL

PLAINTIFFS' OPPOSITION TO  
MOTION TO INTERVENE

Plaintiffs T-Mobile West LLC ("T-Mobile") and Independent Towers Holdings, LLC ("Independent Towers") (collectively "Plaintiffs") hereby oppose the Motion to Intervene filed by Medina Residents, an unincorporated association; Cynthia F. Adkins and John F. Harris, a married couple; Kanan and Bhavnish Lathia, a married couple; Eric and Sarah Oeltjen, a married couple; Laurel and Steve Preston, a married couple; Brett and Jenny Duncan, a married couple; and RespectMedina, a Washington nonprofit organization (collectively, the "Objectors").

## I. INTRODUCTION

This case involves the City of Medina's (the "City") unlawful denial of an application to construct a personal wireless service facility in the Fairweather Park and Nature Preserve in the City. Specifically, it involves Plaintiffs' effort to install a new wireless tower as a permanent replacement for an over 10-year old, 55 foot tower that had been maintained by T-Mobile only 158 feet from the site of the proposed tower (or little more than the distance across a baseball diamond). T-Mobile was forced to relocate, and operate from temporary towers in the interim, due to the Washington Department of Transportation ("WSDOT") SR 520 Evergreen Point Bridge replacement project. The proposed permanent tower is in the one place in the City where a tower over 35 feet tall is permitted – in Fairweather Park.

Objectors had their opportunity to participate in the application proceeding and did so. They were successful in pressuring the City's hearing examiner to deny the application. They got what they wanted. Under federal law, they have no further role and no further cognizable interest. Congress enacted Section 332(c)(7) of the federal Communications Act to limit the authority of local governments to deny wireless facility applications precisely to prevent political, parochial, "NIMBY" ("not in my backyard") interests from thwarting the greater public interest in deployment of new wireless networks and services. The sole issues before this Court concern whether the City's denial violated Plaintiffs' rights under federal law. If the City's denial violated federal law, then federal law preempts any of the interests that Objectors assert. Moreover, there is no indication that the City will fail to vigorously defend Plaintiffs' claims. Rather, Objectors' proposed intervention threatens merely to confuse, complicate, and delay the proceeding through their continued attempt to press the positions that they were

1 already allowed to enter into the administrative record. Accordingly, they are not entitled to  
2 intervention, and their motion should be denied.

3 In considering the Objectors' Motion to Intervene, it is important to understand the  
4 nature of Plaintiffs' two causes of action. Specifically, Plaintiffs assert two causes of action:  
5 that the City's denial of the proposed wireless facility (1) is not supported by substantial  
6 evidence contained in the written administrative record, in violation of 47 U.S.C. §  
7 332(c)(7)(iii) (the "substantial evidence" claim), and (2) will effectively prohibit T-Mobile  
8 from providing personal wireless service in the vicinity of the proposed facility, in violation of  
9 47 U.S.C. § 332(c)(7)(i)(II) (the "effective prohibition" claim). The only legal issue before the  
10 Court on Plaintiffs' "substantial evidence" claim is whether the reasons for denial identified in  
11 the City's denial are supported by substantial evidence in the administrative record.  
12 Accordingly, Plaintiffs' first cause of action is not susceptible to discovery or new evidence.  
13 There is nothing that the Objectors can add.

14 Plaintiffs' "effective prohibition" claim, on the other hand, is not limited to evidence  
15 contained in the administrative record. Instead, the second cause of action is focused only on  
16 the effect of the denial *on the Plaintiffs*, and specifically on T-Mobile's ability to provide  
17 personal wireless service to the area around the proposed wireless facility. Therefore, the  
18 relevant evidence is limited to whether there is a significant gap in T-Mobile's service and  
19 whether T-Mobile engaged in a good faith evaluation of available and feasible alternatives that  
20 might be less intrusive on the values the denial decision sought to protect.

21 Although the City is the only proper defendant, and is fully capable of defending this  
22 case, the Objectors seek to intervene as defendants. The interests Objectors assert are not  
23 significantly protectable interests that will be impaired by a decision in Plaintiffs' favor.

Objectors' interests are adequately represented by the City's defense of this case. And the interests the Objectors assert do not present common questions of law or fact with Plaintiffs' claims. Accordingly, their Motion should be denied.

## **II. OBJECTORS' ARE NOT ENTITLED TO INTERVENE AS OF RIGHT**

To intervene as of right under Fed. R. Civ. P. 24(a)(2), an applicant must: (1) assert a "significantly protectable" interest relating to the property or transaction that is the subject of the action; (2) demonstrate that its interest is inadequately represented by the parties to the action; (3) show that disposition of the action without intervention may as a practical matter impair or impede its ability to protect that interest; and (4) apply to intervene in a timely manner. *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998); *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1061 (9th Cir. 1997). Failure to satisfy any of these four elements requires rejection of a motion to intervene. *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 950 (9th Cir. 2009).

The Objectors Motion should be denied because they do not have a "significantly protectable" interest in the subject property or transaction and cannot demonstrate that the interests they do assert are not adequately protected by the City.

### **A. The Objectors' Possess No Protectable Interest To Support Intervention**

When considering whether an applicant has a "significantly protectable" interest to justify intervention, courts in the Ninth Circuit must consider: (1) whether the interest is protectable by some law; and (ii) whether there is a relationship between the legally protected interest and the claims at issue. *Wilderness Soc. v. U.S. Forest Service*, 630 F.3d 1173, 1179 (9th Cir. 2011). "Although the intervenor cannot rely on an interest that is wholly remote and speculative, the intervention may be based on an interest that is contingent upon the outcome of

1 the litigation.” *City of Emeryville v. Robinson*, 621 F.3d 1251, 1259 (9th Cir. 2010).

2 All of the “interests” Objectors assert relate to their status as neighboring land owners  
 3 who oppose construction of a replacement cell tower near their homes. They allege that if the  
 4 proposed wireless facility is built, they “will suffer adverse impacts to aesthetics, views and  
 5 property values as well as the loss of public space for both active and passive recreation and  
 6 enjoyment and non-radiation health and safety concerns.” (Obj. Mot. 2.) As the Objectors  
 7 admit, these interests are “interests in opposing the Proposed Tower.” (Obj. Mot. at 6.)  
 8 However, they are not legally protectable interests that will be impaired if Plaintiffs prevail in  
 9 this case. Objectors’ stated interest in aesthetics and property value are not sufficiently  
 10 individualized or certain to support intervention. *See Montana v. U.S. Envtl. Prot. Agency*, 137  
 11 F.3d 1135, 1142 (9th Cir. 1998) (holding that government approval of an action that may  
 12 decrease property values of third parties is not sufficient to create an interest for the purposes of  
 13 intervention); *Omnipoint Communications, Inc. v. City of White Plains*, 202 F.R.D. 402, 404  
 14 (S.D.N.Y. 2001) (recognizing that the proposed intervenor’s interest in a particular view is not  
 15 a protectable right, and that general aesthetic considerations are the province of the  
 16 municipality); *Lucas v. Planning Bd. of the Town of LaGrange*, 7 F. Supp.2d 310, 328-29  
 17 (S.D.N.Y. 1998) (even where certain residents may feel “especially aggrieved” by the specific  
 18 location of a tower, such aesthetic concerns are properly considered in light of their impact on  
 19 the municipality as a whole, and are thus best protected by the municipality). Objectors do not,  
 20 and cannot, identify any law protecting the Objectors’ asserted interests.

21 The Objectors’ reliance on *Nextel Communications of the Mid-Atlantic, Inc. v. Town of*  
 22 *Hanson*, 311 F.Supp.2d 142 (D. Mass. 2004) is inapposite. First, the interests asserted by the  
 23 Objectors are not “significantly protectable” under Ninth Circuit law. *See Montana*, 137 F.3d

1 at 1142; *see also*, *Trunk v. City of San Diego*, 2012 WL 6213712 (S.D. Cal. 2012) (denying  
 2 citizens’ intervention for lack of a protectable interest in preserving government land); *Mi*  
 3 *Pueblo San Jose, Inc. v. City of Oakland*, 2007 WL 578987 (N.D. Cal. 2007) (denying  
 4 intervention for lack of a protectable interest in rejecting building permits to keep plaintiffs out  
 5 of community). Second, the *Town of Hanson* court’s determination that the abutter’s interest  
 6 regarding aesthetics, safety, and property value were sufficient to support intervention was  
 7 based entirely on a Massachusetts state case that granted an abutter intervention based on their  
 8 standing under Massachusetts law as a “person aggrieved” to challenge a zoning board of  
 9 appeals decision. *Town of Hanson*, 311 F. Supp.2d at 150 (relying on *Butts v. Zoning Bd. of*  
 10 *Appeals*, 464 N.E.2d 108, 111-12 (Mass. App. 1984)). Objectors are not “aggrieved” by the  
 11 decision denying the application and lack standing to bring a claim against the denial under  
 12 Washington law. RCW 36.70C.060(2). Third, *Town of Hanson* is distinguishable for its  
 13 unusual facts. There, the Town first entered into a consent decree to settle Nextel’s federal  
 14 court challenge to the Town’s denial, but then reversed course, denying Nextel’s application on  
 15 other grounds. Even in that case, where the abutters’ interest was found to exist under  
 16 Massachusetts law, and the Town had flip-flopped in its defense, the court found that it was “a  
 17 close question,” whether “the Town might not adequately represent the [abutters’].” *Town of*  
 18 *Hanson*, 311 F. Supp.2d at 252.

19 Furthermore, pursuant to federal law, the Objectors cannot advance any interest related  
 20 to Plaintiffs’ first cause of action that was not already advanced in the administrative process.  
 21 The Objectors have already successfully advocated their opposition in the administrative  
 22 process. (Obj. Mot. 2-4.) Plaintiffs’ “substantial evidence” claim is limited to an evaluation of  
 23 the denial in light of the administrative record. *See MetroPCS, Inc. v. City & County of San*

1 *Francisco*, 400 F.3d 715, 725 (9th Cir. 2005) (substantial evidence review limited to the record  
 2 without new “fact-finding”). No new evidence, such as the Adkins and Lathia Declarations the  
 3 Objectors proffer with their Motion, may be considered. *Id.* Thus, there is not a sufficient  
 4 relationship between the Objectors’ asserted interests and the claims in this case to justify  
 5 intervention.

6 Plaintiffs’ “effective prohibition” claim does permit the introduction of new evidence,  
 7 but such new evidence is limited to proving that there is a “significant gap” in service and that  
 8 there are no available alternatives to filling that gap that are “less intrusive” on the values the  
 9 Hearing Examiner’s decision sought to protect. *T-Mobile USA, Inc. v. City of Anacortes*, 572  
 10 F.3d 987, 995 (9th Cir. 2009) (the “least intrusive means” standard “requires that the provider  
 11 show that the manner in which it proposes to fill the significant gap in services is the *least*  
 12 *intrusive on the values that the denial sought to serve.*” (emphasis in original)). Again,  
 13 Objectors’ asserted interests are unrelated to this claim. None of the Objectors’ stated interests  
 14 have any relation to whether T-Mobile would suffer from a “significant gap” in its service  
 15 without the proposed wireless facility. Likewise, it is clear that the Objectors have not stated  
 16 any interest that relates to an alternative means of filling T-Mobile’s “significant gap.” The  
 17 Objectors are not qualified to address whether any particular location is actually available and  
 18 technologically feasible to satisfy T-Mobile’s coverage needs. *City of Anacortes*, 572, F.3d at  
 19 998 (to even be considered potential alternatives sites must be actually available and  
 20 technologically feasible). Their speculation about other locations is irrelevant. *Id.*; *T-Mobile*  
 21 *West Corp. v. City of Agoura Hills*, 2010 U.S. Dist. Lexis 134329 at \*22 (C.D. Cal. Dec. 20,  
 22 2010). And even if they were qualified, Objectors already submitted their information  
 23 regarding alleged alternatives in the record. *See* Adkins Declaration In Support Of Intervention

1 at ¶ 13.

2 The Objectors may claim that their stated interests are related to whether there are any  
3 “less intrusive” alternatives. But their interest is simply to push any alternative location further  
4 away from them. Their “unique perspective” is simply that any alternative is less intrusive as  
5 long as it is away from them.

6 Indeed, the reason why only the City should be permitted party status is because only  
7 the City can protect the interests of all citizens. Installation of a new wireless tower may  
8 inevitably impact someone. The purpose of elected government is to make decisions that may  
9 sometimes burden some members of the public more than others, but with a view toward the  
10 greater good. Moreover, Congress enacted Section 332(c)(7) precisely to prevent parochial  
11 interests from interfering with greater public interest in the deployment of wireless services.  
12 H.R. Rep. No. 104-204, pt.1, at 95 (1995). For example, the Objectors oppose a wireless  
13 facility in Fairweather Park. Yet, the City Code explicitly allows a tower of up to 80 feet at this  
14 location in Fairweather Park. City Code §§ 20.37.050, 20.37.070. As such, their real objection  
15 is to the Code, which was adopted through a legislative process that is final and not subject to  
16 challenge here.<sup>1</sup> The City is best placed to defend against Plaintiffs’ claims, based on the  
17 interests of all Medina residents, and in keeping with the adopted land use policies expressed in  
18 the Code.

19 Finally, any legal interest that Objectors may claim in the validity of the Hearing  
20 Examiners’ decision, as a matter of law, is not relevant if the City’s denial violates federal law.  
21 The Supremacy Clause dictates that Objectors cannot have a protectable legal interest in a  
22

23 <sup>1</sup> The Objectors’ dissatisfaction with the City’s legislative choice of Fairweather Park as a preferred location is not properly before this Court. Objectors’ remedy would have been to timely challenge the City’s adoption of the wireless code before the Growth Management Hearings Board, not to intervene here.



1 result that violates federal law.

2 **B. The Objectors' Interests Are Adequately Represented by the City**

3 To determine whether a proposed intervenor's interests will be adequately represented,  
 4 courts in the Ninth Circuit consider: "(1) whether the interest of a present party is such that it  
 5 will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party  
 6 is capable and willing to make such arguments; and (3) whether a proposed intervenor would  
 7 offer any necessary elements to the proceeding that other parties would neglect." *Arakaki v.*  
 8 *Cayetano*, 324 F.3d 1078, 1086 (9th Cir. 2003). "[W]hen the government is acting on behalf of  
 9 a constituency that it represents," there is an assumption of adequacy. *Id.* "In the absence of a  
 10 'very compelling' showing to the contrary," it will be presumed that a state adequately  
 11 represents its citizens when the applicant shares the same interest." *Id.* (emphasis added); *see*  
 12 *also, U.S. v. City of Arcata*, 2009 WL 1292961 (N.D. Cal. 2009) (denying intervention because  
 13 the City adequately represented the applicant's interests); *New Par v. Lake Township*, 2007 WL  
 14 128944 (W.D. Mich. 2007) (denying intervention in a wireless siting case in part because the  
 15 Township adequately represented the abutting property owner's alleged interest).

16 The Objectors allege that the City will not adequately represent their stated interests  
 17 because the City will be the landlord for the proposed wireless facility if the Hearing  
 18 Examiner's denial is found to have violated federal law. (Obj. Mot. 7-8.) The Objectors'  
 19 speculation regarding the City's motives is not sufficiently compelling to overcome the legal  
 20 presumption that the City will adequately defend the denial.

21 The mere fact that the City would be the landlord of a tower located in Fairweather Park  
 22 does not render the City unfit to represent the public's interests. *See Nextel West Corp. v.*  
 23 *Township of Scio*, 2007 WL 2331871 (E.D. Mich. 2007) (denying intervention where

1 applicants alleged “‘back door dealings’ between Plaintiff and Township,” and holding that  
 2 “[e]ven if a consent agreement is ultimately reached in this matter, the fact that the parties settle  
 3 on terms different from those the applicants would have preferred does not negate the adequacy  
 4 of the Township’s representation of Applicant’s interests.”). Indeed, the Federal  
 5 Communications Commission (“FCC”) recently recognized that there may be legitimate public  
 6 interests supporting a preference for installation on municipal property. *Acceleration of*  
 7 *Broadband Deployment by Improving Wireless Facilities Siting Policies*, Report & Order, FCC  
 8 14-153, ¶ 280 (Oct. 21, 2014). Moreover, under the City’s Code, public properties are one of  
 9 the few possibilities for the deployment of wireless infrastructure. City Code §§ 20.37.050,  
 10 20.37.060, 20.37.070. The City has no special interest in the Park over other public properties.

11 Moreover, as discussed above, the only evidence related to the interests the Objectors  
 12 assert that the Court should consider in this case is contained in the administrative record.  
 13 Those interests are adequately represented by the City’s presentation of the record to the Court.  
 14 It is the Court’s role to determine whether the evidence therein is substantial enough to support  
 15 the Hearing Examiner’s decision. Due to the nature of the case, so long as the City provides  
 16 the Court with the complete administrative record, the Objectors cannot “offer any necessary  
 17 elements to the proceeding that other parties would neglect.”

18 Simply put, the Objectors’ distrust of the City is not a compelling showing that the City  
 19 will not adequately defend the Hearing Examiner’s decision. Therefore, intervention by right is  
 20 not appropriate.

### 21 **III. OBJECTORS DO NOT MEET THE 24(b) PERMISSIVE INTERVENTION** 22 **STANDARD**

23 A court may grant permissive intervention under Fed. R. Civ. P. 24(b)(2), “where the  
 applicant shows (1) independent grounds for jurisdiction; (2) the motion is timely; and (3) the

1 applicant's claim or defense, and the main action, have a question of law or a question of fact in  
 2 common." *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 839 (9th Cir. 1996).  
 3 However, permissive intervention is "not intended to allow the creation of whole new lawsuits  
 4 by the intervenors." *Donnelly v. Glickman*, 159 F.3d 405, 412 (9th Cir. 1998) (internal citation  
 5 omitted).

6 The Objectors seek permissive intervention on the grounds that they will "bring a  
 7 unique perspective to the matter and are intimately familiar with the record before this Court,  
 8 and its defenses of this suit will accordingly raise questions of law or fact that are in common  
 9 with those raised in the Complaint." (Obj. Mot. 9.) However, the Objectors fail to meet the  
 10 first and third requirements for permissive intervention.

11 The Objectors have no independent basis for jurisdiction. The Communications Act  
 12 authorizes suits only by parties *adversely affected* by the *denial* of a personal wireless facility.  
 13 See 47 U.S.C. § 332(c)(7)(B)(v); *Drago v. Garment*, 691 F. Supp.2d 490, 494 (S.D.N.Y. 2010);  
 14 *Jaeger v. Cellco Partnership*, 2010 WL 965730, \*8 (D. Conn. 2010). Thus, the Objectors  
 15 cannot rely on the Communications Act for independent jurisdiction. Moreover, their asserted  
 16 interests are insufficient to support independent jurisdiction, because they present no  
 17 protectable interest that would not be superseded by a finding that the denial violates federal  
 18 law. See, *Northwest Forest Resource Council v. Glickman*, 82 F.3d at 839 (finding no  
 19 independent basis for jurisdiction when stated interest was preempted by federal law at issue).

20 Finally, the interests the Objectors assert do not raise any questions of law or fact that  
 21 are common to Plaintiffs' First Amended Complaint. Plaintiffs' substantial evidence claim  
 22 takes the administrative record – including the Objectors participation and advocacy related to  
 23 their stated interests – as it is. Objectors have already had their opportunity to introduce their

1 allegedly unique perspective in the administrative record, and consideration of Objectors'  
 2 declarations or any other extrinsic evidence is inappropriate. Likewise, as explained in Section  
 3 II.A., Objectors' opposition to the tower does not qualify them to address whether T-Mobile  
 4 has a significant gap in coverage or whether technologically feasible and actually available  
 5 alternative locations exist that would be less intrusive on the values the City sought to promote.  
 6 Speculation that T-Mobile could locate a facility somewhere else is not relevant and will not  
 7 advance the Court's consideration of this case. *See, e.g., City of Anacortes*, 572 F.3d at 998;  
 8 *City of Agoura Hills*, 2010 U.S. Dist. Lexis 134329 at \*22.

#### 9 IV. CONCLUSION

10 For the reasons set forth above, Plaintiffs respectfully request that the Court deny the  
 11 Objectors' Motion to Intervene.

12 Dated: December 8, 2014

Respectfully submitted,

14 /s/ Linda Atkins

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**CERTIFICATE OF SERVICE**

The undersigned certifies under the penalty of perjury under the laws of the state of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the state of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On this date I caused to be served in the manner noted below a copy of the foregoing document entitled *Plaintiffs' Opposition to Motion to Intervene* on the following:

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DATED this 8th day of December, 2014.

s/Sasha Forbes  
Sasha Forbes, Legal Assistant